NO. 86-307

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1986

CITY OF PADUCAH: JOHN K. PENROD, as Mayor, and JOE VITERISI, ROBERT A. COLEMAN, HAROLD (SHORTY) FORD and JAMES W. FLYNN, as Commissioners of said City: JAMES W. UTTER, as Corporation Counsel, and THURMAN BAKER, as Treasurer thereof,

Petitioners,

v.

INVESTMENT ENTERTAINMENT, INC.; BELTLINE NEWS AND ARCADE CLUB,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS REPLY MEMORANDUM

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CITY OF PADUCAH; JOHN K. PENROD, as Mayor, and JOE VITERISI, ROBERT A. COLEMAN, HAROLD (SHORTY) FORD and JAMES W. FLYNN, as Commissioners of said City; JAMES W. UTTER, as Corporation Counsel, and THURMAN BAKER, as Treasurer thereof,

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Respondents' argument that the Petitioners have "waived" both the first defense (failure to state a claim upon which relief can be granted) and the

fourth defense (abstention) of their Answer[1] because they did not mention the same in their "Memorandum in Support of City of Paducah Motion for Summary Judgment" in the United States District Court[2] or in their "Brief for City of Paducah, et al."[3] in the Court of Appeals for the Ninth Circuit, is faulty in two regards.

First of all, Respondents' contentions are inconsistent with the plain language of the standard for adjudication summary judgment motions which has been established in Rule 56(c) of the Federal Rules of Civil Procedure, recently examined by this Court in Celotex Corp. v. Catrett, 477 U.S. ___, 91 L.Ed.2d 265 at 273, 106 S.Ct. ___.

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1 See Appendix "G" to the Petition for Writ of Certiorari at page G-1 and G-3.
2 See Appendix "I" to Respondents' Brief in Opposition.
3 See Appendix "J" to Respondents' Brief in Opposition.

(June 25, 1986). Further, Respondents' "waiver" argument ignores the Eleventh Amendment, jurisdictional aspect of Petitioners' "abstention" defense, and the import of this Court's recent ruling on Abstention in Ohio Civil Rights Commission, et al. v. Dayton Christian Schools, Inc., et al., 477 U.S. ___, 91 L.Ed.2d 512, 106 S.Ct. ___ (1986).

In the latter regard, Petitioners contend that the federal policy on comity does not permit an "implied" waiver because of the federal/state powers confrontation which is thereby invited. The requirement that the record must contain an "express" waiver avoids the inevitable Eleventh Amendment jurisdictional dispute which this Court created in the moral public nuisance abatement area, when it held in Mitchum, dba The Book Mark v. Foster, Prosecuting Attorney of Bay County,

Florida, 407 U.S. 225 (1972), that 42 U.S.C. section 1983 was an expressly authorized exception to the Anti-Injunction Statute, 28 U.S.C. section 2283.

I

IN ADJUDICATING PETITIONERS' MOTION FOR SUMMARY JUDGMENT, THE UNITED STATES DISTRICT COURT WAS REQUIRED, UNDER THE "PLAIN LANGUAGE" OF F.R.C.P. RULE 56(c), TO CONSIDER ALL OF PETITIONERS' PLEADINGS, INCLUDING THE FIRST AND FOURTH DEFENSES OF THE ANSWER.

The plain language of Rule 56(c) precludes the implication of waiver.

The test for adjudicating summary judgment motions is set forth in Rule 56(c) of the Federal Rules of Civil Procedure. That section provides:

> "(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories,

> and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment, as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

In Celotex Corp. v. Catrett, 477 U.S. ___, 91 L.Ed.2d 265, 106 S.Ct. ___ (June 25, 1986), this Court had occasion to consider the "mandate" of the plain language of that standard at page 273:

> "We think that the position taken by the majority of the Court of Appeals is inconsistent with the standard for summary judgment set forth in Rule 56(c) of the Federal Rules of Civil Procedure. Under Rule 56(c), summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' In our view, the plain language of Rule 56(c) mandates. . . ." (our emphasis).

Petitioners contend that the "plain

language" of Federal Rules of Civil Procedure 56(c), noted above, requires that the first and fourth defenses of the Answer, as pleadings, must be considered. Rule 56(c) precludes an application of the appellate "waiver" rule discussed by this Court in United States v. Estate of Donnelly, 397 U.S. 286 at 319, fn. 5 (1970) and relied upon by the Respondents herein.

In this special circumstance involving an adjudication of a summary judgment motion, comity does not permit the U.S. District Court below, in the face of the plain language of the federal statute and a record which documents a reliance upon the two special defenses of "abstention" and "failure to state a claim upon which relief can be based," to "presume" that the City of Paducah has waived state sovereignty which is the very foundation of its entire summary judgment motion.

II

RESPONDENTS' BRIEF IN OPPOSITION HAS IGNORED THIS COURT'S RULING IN OHIO CIVIL RIGHTS COMMISSION, ET AL. v. DAYTON CHRISTIAN SCHOOLS, INC. THAT DECISION HOLDS, IN EFFECT, THAT A WAIVER OF THE "STATE SOVEREIGNTY" CLAIM WHICH LURKS IN THE BACKGROUND OF ALL YOUNGER-HUFFMAN LITIGATION MUST BE EXPRESS AND MAY NOT BE PRESUMED.

Respondents' Brief in Opposition has ignored the Eleventh Amendment, jurisdictional aspect of Petitioners' abstention defense and this Court's recent decision in Ohio Civil Rights Commission, et al. v. Dayton Christian Schools, Inc., supra. The "appellate" waiver rule discussed at footnote 5 of United States v. Estate of Donnelly, 397 U.S. 286 at 319, which is cited by Respondents, can have no application where the merits of the underlying state claim are predicated upon a claim of "lack of jurisdiction" based upon "state sovereignty" and the Eleventh Amendment.

Where, as here, Respondents attempt to invoke the equity jurisdiction of the federal courts against a State government and the State government does not waive its attribute of state sovereignity, and does not expressly consent to have the challenge to the "important state interest" tried in the federal courts, the Tenth Amendment principles expressed in Fry v. United States, 421 U.S. 542 at 547, fn. 7 (1975), and the Eleventh Amendment principles expressed in Hans v. Louisiana, 134 U.S. 1 (1890) and Ex Parte Young, 209 U.S. 123 unite to present a potential jurisdictional conflict of state and federal powers. That conflict raises a question as to whether the federal court has jurisdiction to act on the matter under the fiction engaged in by this Court in Ex Parte Young, supra, and the resulting "interplay" of

that fiction and the policy limitations expressed by this Court in Watson v. Buck, 313 U.S. 387 at 401-402 (1941) which holds that a state statute, which contains a severability clause, must be "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply it. . . ."before a federal court can interfere with the right of a state court to interpret such legislation.

The origin of this "jurisdictional" confrontation between state and federal power in the civil moral public nuisances abatement area can be traced to this Court's landmark decision in Mitchum, dba The Book Mark v. Foster, Prosecuting Attorney of Bay County, Florida, 407 U.S. 225 (1972). In Mitchum, a Florida County Prosecutor sought

to close a bookstore as a public nuisance. The state court entered a preliminary order prohibiting the store's continued operation and, after further proceedings in the state court, the store owner sought injunctive relief against the state action, arguing that his civil rights of free expression, under 42 U.S.C. section 1983 (protected by the First and Fourteenth Amendments) were violated by the state procedures. A three-judge District Court held that the injunction was prohibited by 28 U.S.C. section 2283. After this court noted jurisdiction in Mitchum on May 3, 1971, Associate Justices Black and Harlan departed from the bench, and the case was thereafter decided by a seven-member court which held abstractly, and without relation to the merits, that the Civil Rights Act of 1871, commonly referred to as 42 U.S.C. section 1983,

is an "expressly authorized" exception to the Anti-Injunction Statute.

In a concurring opinion, three of the seven justices participating in the decision (Chief Justice Burger and Associate Justices White and Blackmun) stated their concern over the potential conflict between state and federal powers such federal interference would spawn,and voiced the following caveat:

> "I concur in the opinion of the Court and add a few words to emphasize what the Court is and is not deciding today as I read the opinion. The Court holds only that 28 U.S.C. section 2283, which is an absolute bar to injunctions against state court proceedings in most suits, does not apply to a suit brought under 42 U.S.C. section 1983 seeking an injunction of state proceedings. But, as the Court's opinion has noted, it does nothing to 'question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding.' Ante, at 243, 32 L.Ed.2d at 718. In the context of pending state criminal proceedings, we held in Younger v. Harris, 401 U.S. 37, 27

L.Ed.2d 669, 91 S.Ct. 746 (1971), that these principles allow a federal court properly to issue an injunction in only a narrow class of circumstances. We have not yet reached or decided exactly how great a restraint is imposed by these principles on a federal court asked to enjoin state civil proceedings. Therefore, on remand in this case, it seems to me the District Court, before reaching a decision on the merits of appellant's claim, should properly consider whether general notions of equity or principles of federalism, similar to those invoked in Younger, prevent the issuance of an injunction against the state 'nuisance abatement' proceedings in the circumstances of this case." (our emphasis).

II(A) The Historical Background of The "State Sovereignty" Issue Which Lurks In The Background of The Younger-Huffman Abstention Objection to Federal Jurisdiction

In 1908, this Court, in its landmark decision in Ex Parte Young, 209 U.S. 123 (1908) had held that State officials could be enjoined by Federal Courts from enforcing unconstitutional state

statutes, notwithstanding the Eleventh Amendment objection, through this Court's creation of a "fiction" in that case.[4/] Parenthetically, it must also be observed that the Ex Parte Young fiction does not authorize a federal court to enjoin state officials from enforcing constitutional state statutes, nor does its rationale and the evolution of that rationale permit that result. To the extent that such does occur as the result of the Ex Parte Young fiction and an erroneous federal court ruling, an infringement upon state sovereignty results, in much the same manner as an infringement upon civil rights in the application of unconstitutional state legislation, as Respondents have claimed in their federal cause of action in the U.S. District Court below.

4/ See Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power (1980) at 154-159.

In 1910, as a response to the intrusion of Ex Parte Young on legitimate state powers, Congress enacted the Three-Judge Court Act (Act of June 18, 1910, Ch. 309, Section 17, 36 Stat. 577) which prohibited a single Federal district judge (as in this case) from issuing interlocutory injunctions against allegedly unconstitutional State statutes, and required that cases seeking such injunctive relief be heard by a district court made up of three judges. The Act also contained a provision for direct appeal to the Supreme Court in the belief that the provision for speedy review would minimize the impairment of the sovereign rights of state governments.

In 1976, as the number of the three-judge court cases and direct appeals, which resulted from this Court's decision in 1971 in Mitchum v. Foster,

supra, dramatically increased and clogged this Court's docket, Congress responded to this Court's supplications for relief from the workload by repealing the three-judge requirement - but only after the fears of Congress were dissipated by an assurance that the effect of the abstention doctrines established in Younger v. Harris, 401 U.S. 37 (1971) and Huffman v. Pursue Ltd., 420 U.S. 592 (1975) were such that "the rationale that gave life to the three-judge court in 1910 has all but disappeared." Report of the Senate Committee on the Judiciary (S.Rep. No. 94-204, 94th Cong., 1st Sess., 1975, p. 2).

II(B) Under This Court's Ruling on the Younger-Huffman Objection To Federal Interference in Ohio Civil Rights Commission et al v Dayton Christian Schools Inc., Waiver of State Sovereignty Must Be Express And May Not Be Presumed.

Petitioners submit that the Tenth and Eleventh Amendment problems dealing with the important state interests and state sovereignty that gave life to the Ex Parte Young "fiction", the three-judge court creation in 1910, and its repeal by Congress in 1976 under the assurance that the Younger-Huffman abstention doctrine would alleviate the state-federal conflict provided the historical precedent which caused this Court to rule as it did in Ohio Civil Rights Commission et al v. Dayton Christian Schools Inc., supra, that a waiver of state sovereignty must be express and may not be presumed, at page 521

> "The Commission urged such abstentation in the District Court, and on oral argument here. Dayton has filed a post argument brief urging that the Commission has waived any claim to abstention because it had stipulated in the District Court that that court had jurisdiction of the action. We think, however, that this argument misconceives the nature of Younger abstention. It does not

> arise from lack of jurisdiction in the District Court, but from strong policies counseling against the exercise of such jurisdiction where particular kinds of state proceedings have already been commenced. A State may of course voluntarily submit to federal jurisdiction even though it might have had a tenable claim for abstention. See Brown v Hotel Employees, 468 US 491, 500, n 9, 82 L.Ed.2d 373, 104 S Ct 3179 (1984); Ohio Bureau of Employment Services v Hodory, 431 US 471, 479-480, 52 L Ed 2d 513, 97 S.Ct.1898 (1977); Sosna v Iowa, 419 US 393, 396-397, n.3, 42 L.Ed.2d 532, 95 S.Ct.553 (1975). But in each of these cases the State expressly urged this Court or the District Court to proceed to an adjudication of the constitutional merits. We think there was no similar consent or waiver here, and we therefore address the issue of whether the District Court should have abstained from deciding the case.

The error of the Federal Court below was that it did not consider Ex Parte Young and the evolution of that doctrine.[5/]

5/ See, generally, Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power (1980) at pages 154-159 and Section V "Decyphering Congressional Intent" at page 163 et seq.. At page 157, the author notes:

> "The danger of any legal fiction is that those applying it will forget the purpose it was designed to serve. This has proven true in the application of the doctrine of Ex Parte Young."

III

THE ALLOCATION OF STATE AND FEDERAL POWER IN THE AREA OF CIVIL ABATEMENT OF MORAL PUBLIC NUISANCES, WHICH WAS DRAWN IN QUESTION BUT LEFT UNDECIDED BY THIS COURT'S NOTE OF JURISDICTION IN MITCHUM V. FOSTER IN 1971, IS RIPE FOR REVIEW AT THIS TIME.

The three questions which are presented in the Paducah petition are: (1) Whether a state has the power to declare a place which is a manufactory of obscenity to be a per se public nuisance; (2) Whether a state has the power to revoke the business license of that activity as an unlawful trade practice under state law, and (3) Whether state sovereignty and the Tenth and Eleventh Amendments preclude a federal court from interfering with such governmental interest.

Although the seven-member Court in Mitchum v. Foster decided against the state's interest in relation to the last question, insofar as the

jurisdictional question presented by 28 USC Section 2283 was concerned, the Mitchum Court did not address the first two questions (which were inherent in the law enforcement effort in Mitchum). There, those questions went unanswered. See Chief Justice Burger's concurring opinion in Mitchum, supra, appearing at page 11 supra.

That the above questions are ripe for reexamination, see generally, the Attorney General's Commission on Pornography, Final Report, July 1986, and the brief reference at page 757-758 to "nuisance laws". More particularly, note this Court's recent decision in Arcara District Attorney of Erie County v. Cloud Books Inc., et al 478 U.S.____, 92 LEd 2d 568, 106 SCT ___(July 7, 1986); the Amicus Curiae Brief of the City of Santa Ana, California in the Arcara case; and the Amicus Curiae Brief of the City of Santa

Ana, California in the City of Paducah Petition for Writ of Certiorari herein.

On the question of ripeness, this Court is asked to take Judicial Notice of the news report appearing this past week in the Orange County Edition of the Los Angeles Times, attached hereto as Exhibit I. The final result in that 10 year civil abatement proceedings is dependent upon this Court's resolution of the same two legal questions which are before this Court in the Paducah Petition.[6/]

Dated:
Oct. 6, 1986

Respectfully Submitted,

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6/ The Theatre has moved for summary adjudication on the issues of "closure" and "license revocation." On a cross motion, Santa Ana has asked for summary adjudication on the identical issues which are framed as Questions II(a) and II(b) in the Paducah Petition, citing the Santa Ana Ordinance to distinguish People ex rel Busch v. Projection Room Theater, 17 Cal. 3d 42.

CERTIFICATE OF SERVICE

I, hereby certify that on this ~~6th~~ 7th day of October , 1986, the original and 40 copies of the within Petitioners Reply Brief were deposited in the United States Post Office in ~~Van Nuys~~ Sun Valley, California with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served.

Mr. Joseph S. Freeland
Freeland, Glanville and Megibow
910 Citizens Bank Building
Paducah, Kentucky 42001
(Attorney for Respondents)

Attorney for
Petitioners.

EXHIBIT 1

Copy of News Article in the Orange County Edition of the Los Angeles Times Reporting on the City of Santa Ana's Ten Year Public Nuisance Abatement Lawsuit With the Mitchell Brothers Santa Ana Theatre.

(Reference: Petitioners' Reply Brief at page 20.)

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Los Angeles Times
Sunday, September 28, 1986

Council Fears Image Damage

A Long, Costly 'Porn War': Why Santa Ana Fights On

By STEVE EMMONS, *Times Staff Writer*

There was no warning. One day the theater marquee read "The Apple Dumpling Gang" and "Swiss Family Robinson," the next day, "Sodom and Gomorrah."

The nice, new United Artists theater at Honer Plaza in north Santa Ana—the part of town containing the city's well-to-do and middle-class neighborhoods—overnight became the Mitchell Brothers Theatre, specializing in hard-core erotic films.

The neighbors reacted just as suddenly. They stormed the City Council chambers and demanded immediate action from surprised council members. Their appearance in 1975 set off what former Santa Ana Councilman Gordon Bricken has called "a chain of inevitable events." Responding to the wrath of the neighbors, the council launched a legal attack to close down the theater.

'The Mitchell brothers are a savvy group of guys.'

—Gordon Bricken,
former Santa Ana councilman

And now, Bricken said, the council can never retreat without being accused of standing "for" pornography.

The result: 11 years of costly litigation that continues with no indication of when it will end. Virtually every week the city files a new lawsuit against the theater—filings that have become so routine that the theater's lawyer does not appear in court to oppose them. He lodges his objections by telephone.

The city, which has filed close to 40 lawsuits against the theater, has paid more than $300,000 in legal costs and is piling up additional legal expenses at an estimated rate of at least $100,000 a year. To add to the city's potential costs, two Superior Court judges have ordered the city to pay some of the theater's legal expenses, estimated by theater attorneys to be more than $1 million in one suit alone.

During the 11 years, some of the movies have been banned from the theater as obscene, but no court—from the Superior Court in Santa Ana to the Supreme Court in Washington—has been willing to order the theater closed. The city attorney has advised that the case cannot be won under present case law.

And the theater remains open, still is showing

THEATER: Political 'Predicament' Cited in Long, Costly Legal Battle

X-rated films and, according to both city and theater sources, is grossing a little under $1 million a year.

Yet there are compelling political reasons for the City Council to keep up the attack on the theater, regardless of cost. They were demonstrated last February when, in closed session, all but one council member expressed willingness to end the litigation with an out-of-court settlement. That same night in public session, however, the council unanimously voted $200,000 to intensify the attack.

How could this happen?

"It's just a predicament for us, and the less said, the better," said Councilman Wilson B. Hart during an interview.

As brief as he was, Hart said more than most other council members would. Mayor Dan Griset, a candidate for state Assembly, sent word through an aide that he wouldn't be commenting at all. Councilwoman Patricia A. McGuigan said she doesn't even discuss it with her husband. Other council members simply didn't return calls.

The city's dilemma was politically unavoidable, said Bricken, a City Council member from 1974 to 1984 who did, and still does, favor the litigation. The die was cast the moment the outraged neighbors first appeared before the council, he said.

"In my view—and I've felt this from the outset—it was a chain of inevitable events: That as long as the public appears at all, at *any* time, to express public outrage on this subject, it will go on and on, like a perpetual motion machine. And that's in fact what's happened. . . . Because regardless of what the court might be doing or what anybody else's view is on the subject, it is simply unpopular to be on the side of pornography."

But the City Council contributed its share to the predicament, Bricken said, by making a naive, fundamental miscalculation.

"Not in the wildest scenario did anyone ever imagine a group of porno movie makers would have the ability to stay in this 10 years. Not *two* years. . . . We [council members] had this discussion. The idea of getting into it was the theory that the big guy on the block could just knock 'em out, Bricken said.

"The perception was that these movies are made by two guys who are milkmen in their regular life, and they do this to make a few bucks," Bricken said. In reality, the council discovered, "the Mitchell brothers are a savvy group of guys," Bricken said.

The Mitchell brothers, Jim and Artie, are headquartered in San Francisco. They not only operate theaters but produce many of the

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films shown in them. Many of the X-rated videotapes available today are Mitchell Brothers productions. In Santa Ana, their theater manager said, 150,000 customers buy tickets each year.

"We've been in this business 18 years, and we've had over 500 [court] cases—copyright, obscenity, pornography. It's a cost of business," Jim Mitchell said.

"This is a hell of a big case. We're going to go all the way with them," he added. "We expect to win. We will do whatever it takes."

Same Position

The Santa Ana City Council, faced with a difficult but not unusual political situation, took much the same public position in 1975, Bricken recalled.

United Artists had built a large, single-screen theater at the outskirts of Honer Plaza just as the industry was changing to small, multiscreen theaters in the heart of shopping centers.

Faced with a long-term lease and low revenues, United Artists sublet the theater to Mitchell Brothers. Under the terms of United Artists' master lease, zoning and use permits, it needed permission from no one to lease the theater to Mitchell Brothers.

The brothers were trying to upgrade the image—and therefore broaden the audience—of X-rated films by using more polished movie production techniques and exhibiting the films in large, well-kept theaters. They were rapidly expanding their small string of theaters for the opening of their $500,000 production, "Sodom and Gommorah," an epic by X-rated movie standards.

'Sleazy Little Theaters'

"So one day someone drives to the Ralphs grocery store or the Montgomery Ward's," Bricken said. "All of a sudden here's this marquee, you know, giving you these titles—'Mary Lou Has a Good Time.' And some of the housewives had never even imagined that such things even were on film, much less on a marquee."

They were outraged, Bricken said, but there was more:

"The vision of these films was [that] they appeared in sleazy little theaters or in artsy-craftsy places in Hollywood, generally in neighborhoods that were rundown. . . . And so when they saw the theater, the reaction was: 'Oh, my God, it's coming to *our* neighborhood! Not only the theater, but *they* are coming to our neighborhood. And our whole way of life is threatened by this theater.' "

Bricken's appraisal was echoed somewhat by the pastor of First Christian Church, across the street from the theater. The Rev. Norman Conner, credited by many as the original organizer of the protest, said years later that it had been a matter of location. The city already had an X-rated theater, The Guild, but it was in a run-down downtown area, viewed as the proper environment for such a theater.

"My position is that if someone wants to spend their money to see this trash, that's their right and privilege . . .," Conner said. "If it was down on Harbor Boulevard, I probably would never have gotten involved."

But it wasn't, so he did, and a group of angry parishioners and neighbors appeared without warning before the City Council late in 1975.

Moral Issues

For years, then-Mayor Lorin Griset, father of the present mayor, had been successfully urging his fellow council members to become more indignant about moral issues in the city, particularly the adult bookstores and topless bars along Harbor Boulevard. "It had a lot to do with sensitizing us" to such issues, Bricken said.

So, he said, when presented with angry citizens protesting an X-rated theater, the council did what it

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usually does under such circumstances, Bricken said. "You send off your troops to see if you can run [the theater] out of town. And that was the beginning of it."

The city attorney, Keith Gow, was sent off to investigate, and he returned, Bricken said, to say that instead of a gold mine, "it's a mine field, that the city really has no authority through its own police powers to do anything about it. The only way that it can attack the situation is through the question of obscenity."

At the council's request, Gow pursued the obscenity question and returned to the council with James J. Clancy.

■

As a political activist, Clancy had helped form national anti-pornography groups campaigning for stronger laws and enforcement. As an attorney subsidized by Citizens for Decency Through Law (now headquartered in Scottsdale, Ariz.), Clancy had been offering legal advice and representation to cities wanting to close down or zone away adult bookstores and theaters.

He had the reputation of a relentless, no-compromise trial attorney fueled by a religious certainty of his cause. He had no other practice.

His supporters in Santa Ana have called him "very committed." His detractors describe him as "obsessed."

Areas Not Explored

"He gave us a presentation in executive session," Bricken said. "He laid it out, I thought, fairly candidly. He felt there were areas of the law that had not been explored. He felt it would be possible to form the law to favor the kind of things we wanted to do.

"He's always conveyed a very firm position that we will win in the long run and that the whole question here is how long it's going to take us to do it."

Clancy said it would require five years to take the issue to the U.S. Supreme Court and it might take several trips there to get the job done, Bricken recalled. "And the council basically said, 'Go get 'em.'

"Frankly, some people expected that we'd go out there, slap the thing on the door and they're gone. Scare them away. And some people felt that the staying power of the city would drive these guys out of business. Some people didn't expect it to last five years, even though Clancy may have told them that."

In October, 1976, the City Council adopted an ordinance drafted by Clancy that declared a theater specializing in "lewd" films to be a "public nuisance."

City councils traditionally have had the power to order removal of dangerous nuisances, such as dilapidated buildings, unfenced pits and noxious dumps. In effect, the new ordinance declared lewd movie theaters to be morally dangerous and therefore also a public nuisance.

Review the Films

Under its provisions, the City Council would review the films, declare them to be lewd, declare that the theater, therefore, is a public nuisance and vote to revoke the theater's business license.

The ordinance required, however, that the council's declarations be confirmed in court. If the judge agreed the films were obscene—and agreed that the ordinance was constitutional—he or she would ban the movies, confirm the license revocation and order the theater to pay damages to the city. Money won this way would permit the city to continue the fight virtually cost-free and indefinitely, according to Clancy's strategy.

Almost immediately, Clancy filed the first of the "public nuisance" lawsuits, and what followed has been described by both sides as legal guerrilla warfare. At times, the maneuvering took weird turns.

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The Mitchell brothers at first voluntarily provided the disputed films and showed them to the court inside their theater. On two occasions, Clancy rented space in the Independence Hall replica at Knott's Berry Farm in Buena Park to screen the films for judges.

But fearing that Mitchell Brothers would resist providing films—a fear that came true—Clancy hired a longtime colleague, former Los Angeles Police Department vice officer Robert McGuire, to attend every movie shown at the theater and record it for evidence. Typically, the theater was showing a different, three-movie bill each week.

$30-an-Hour Assignment

McGuire performed his $30-an-hour assignment for 11 years before being unmasked by theater employees.

He bought a ticket and sat directly in front of the screen. He wrapped an 8-millimeter movie camera in a brown towel and aimed it at the screen, taking one frame each three seconds. He also used a small audio tape recorder and took notes as well.

The result of each week's work was a large artist's portfolio filled with what Clancy termed "time-motion studies": page after page containing strips of small photographs, a depiction of what was showing on the screen at three-second intervals. Also included in some portfolios are commercial videotape versions of the movies in question.

These portfolios have stacked up in two courtrooms and in storage rooms at City Hall. Clancy still brings one each week to court, where he files another lawsuit asking that the court temporarily enjoin that week's bill of movies and set the matter for trial.

The weekly suits became such a ritual that Superior Court Commissioner Jane D. Myers set up ground rules to expedite them.

Routine Hearings

The hearing held Sept. 15 was typical. Only Myers and Clancy were before the bar in Department 22 of Superior Court. Attorney Stuart Buckley, representing the theater, was in his San Francisco office, waiting beside his telephone.

Myers: "Mr. Clancy?"

Clancy: "Good afternoon."

Myers: "You have anything new for me today?"

Clancy: "No, it's the same thing."

He briefly summarized. She asked whether all was exactly as in previous suits. "Yes," Clancy said, "except for the films."

The weekly call was placed to Buckley, who telephonically opposed Clancy's petition.

"Very well," Myers said, "then the request will be denied."

The entire hearing took 4 minutes and 33 seconds—about average, Myers said later.

A few of the close to 40 lawsuits Clancy has filed have resulted in judges and juries declaring specific films to be obscene. Appellate justices have upheld one of those decisions.

But no trial judge has upheld the city's "public nuisance" ordinance. One said it appears to violate the U.S. Supreme Court's doctrine of "prior restraint"—that is, it attempts to stifle future expression on the suspicion that it will be obscene.

"I have a disagreement with CDL (Citizens for Decency Through Law), because I'm the only one who really believes in the 'public nuisance' concept . . .," Clancy said. "I'm saying that the question has not been answered yet [by the U.S. Supreme Court], but it's *about* to be.

"I'm talking about a case where you're laying the foundation for a result that has got to come about. You go up there and take a look. There's 96 films, and every one of them is clear, unadulterated hard-core pornography."

Private Debates

City sources say Clancy has on several occasions stated his strategy: to continue the pressure on the theater, continue to appeal and wait for the U.S. Supreme Court to become more conservative and therefore sympathetic.

During the history of the litigation, council members have come and gone, but they all have debated privately whether to throw in the towel, Bricken said.

"There would always be these milestones when you had to fund it again, and you would have the same discussion: Do we quit? Do we go ahead?

"The secret pact behind the scenes is, we all got to stand one way or another, because nobody can afford to stand [on] either side by themselves. So if one guy on this deal says, 'I don't care what those guys are doing. I'm fighting for God and country and motherhood and all the things that are right in our country,' do you believe any of the rest of them are going to say they're for pornography?"

That is what happened during a closed council session on the proposed settlement negotiated by the city attorney last February, according to former Santa Ana City Manager Robert C. Bobb. Bobb, now city manager of Richmond, Va., in essence, corroborated the account given by Councilman John Acosta, the lone holdout.

"I had no idea it was going to be so easy at the time," Acosta recently recalled.

"I sat there and listened to the whole spiel. They *crucified* Clancy: 'He's no good, he's worthless,' blah, blah, blah.

"There was no official vote taken. It was assumed: We were going out there and accept the settlement offer, dump Clancy and dump the case.

"So we all stand up from the table to walk out, and I said, 'Well, I'm glad the majority of you guys feel that way. I, for one, *don't* feel that way. I'm not going to support the issue. I'm going to oppose it [the settlement].'

"And boy, you could smell rubber burning when I said that. They all skidded to a stop five feet short of the door. They said, 'We're not going to go out there and have you paint us as supporters of pornography.' "

Supporters of Pornography

Acosta said he would have done so, too.

" . . . I'd have said, 'We just happen to have a majority of the council that favors pornography in this community. Now, I don't know how the people of the community feel about pornography, but *I* have a feeling that they don't like it.' "

Acosta likes to judge beauty contests and as part of one was pictured off to the side in a Oui magazine article titled "Oui's Orange County Girlie Search . . . the biggest flesh hunt in Southern California history." The presence of an X-rated theater in north Santa Ana "doesn't really matter to me personally," Acosta said.

But, he added, north Santa Ana is where he lives, and 40% of Santa Ana votes during the June primary election came from that area.

"Now when you say 40%, do you see why John Acosta is where he's at?" Acosta said. "I evaluate the vote results carefully." He has his eye on Roger Stanton's seat on the county Board of Supervisors, Acosta said.

Three council incumbents—P. Lee Johnson, Robert W. Luxembourger and Dan Young—are seeking reelection in November, and even though each comes from one of seven City Council wards, voters citywide cast votes for all council seats.

That could change. An initiative on the same ballot would provide election of council members strictly by ward. Acosta says he thinks it will pass, making his reelection a matter strictly for north Santa Ana voters—the ones who seem to hate the Mitchell Brothers Theatre.

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"I will be sticking by my guns. If the election-by-ward plan gets voted in, I'm going to be very happy. I'm going to be happy either way. I'm happy because I've done a good job of representing Ward 3," Acosta said.

■

In the end, the issue may be settled without a court.

The United Artists' lease on the theater property extends 15 or 20 years, the shopping center owner says, but Mitchell Brothers' sublease expires in June, 1990.

The city in the past considered including Honer Plaza and its theater within the city's redevelopment project boundaries, but the former owner of the center was categorically opposed, Bricken said.

For the past two years, however, the center has been under new ownership—Interstate Consolidated Industries of Carson—and a spokesman for that firm said it is amendable to redevelopment. "It needs to be remodeled anyway," the spokesman said.

Patti Nunn of the city's redevelopment agency said the possibility is being explored. (The only other X-rated theater in the city, The Guild, was moved out by redevelopment.)

Once dislodged from its present theater building, Mitchell Brothers would be subject to the city's zoning ordinances if it wanted to relocate in Santa Ana. The U.S. Supreme Court has ruled that cities legitimately may control where such theaters are located within their boundaries.

But if the issue must be settled in court, there may be no end in sight, Bricken said.

For one thing, even futile litigation can be justified as preventing proliferation of X-rated theaters in the city. "You can say there was only one in 1975 and there's *still* only one in Santa Ana. It's kind of a holding action."

And you can justify it as "a statement of public principle, of what you think is right for the community. And you don't get many opportunities in this arena of public morality to fight the good battle, the good cause."

But most of all, Bricken said, you stay on the righteous side of the issue, regardless of the cost. "Nobody is going to give up this issue until they're *forced* to give up this issue, no matter what they say. . . .

"I would hope that certain council members take the position that we should abandon this lawsuit, because we're going to beat them over the head two years from now," Bricken said.

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Lurid Marquees Catch the Eye and a Little Hell, Too

By BILL BILLITER, *Times Staff Writer*

The Mitchell Brothers Theatre marquee Saturday advertised the showing of "Pretty Girls" and "Love of Silk."

The billing brought afternoon moviegoers, but it also irked some of those doing their Saturday errands at a shoe store, doughnut shop, grocery and drugstore that share Honer Plaza with the controversial movie house.

"I don't like it," Maria Alegria of Santa Ana, accompanied by her 10-year-old daughter, said of the theater's proximity. "I don't think it's appropriate for the kids, and I've seen some real nasty people around that theater."

But among other shoppers and workers Saturday, opinions were mixed about the presence of the Mitchell Brothers Theatre.

Paul Harris, 32, of Santa Ana, pausing to buy a newspaper, said: "It doesn't bother me in the least. Not at all. But I don't go there."

Melanie Bowman, 22, of Santa Ana, pushing one son in a stroller and holding another's hand, said the theater has a right to be there "as long as it doesn't infringe on other people." But Gertrude Eckart, 56, of Orange said the theater "bothers me. It'd be nice if it could be moved."

Roberto Barragan, 27, of Garden Grove agreed. "I've never been there," but, "I think it's bad for this area, and I know some churches and others that want to close it down," he said.

Dorothy Farmer, 69, of Santa Ana spoke critically: "I don't think it belongs. They ought to put it somewhere else if it's got to be here."

At the Ralphs supermarket, store manager Brent Blackhurst, 36, of Oceanside said, "Customers have once in a while said, 'Something ought to be done about that.' [But] it's strictly a constitutional and legal question. Ralphs Grocery Co. wants to be in a community that is family oriented, because the basis of our business is the family.

"I've received complaints from customers about Mitchell Brothers, and certainly Ralphs supports any effort which is done to return Honer Plaza to more of a community atmosphere. But we do support the Constitution."

However, Ramiro Torres, 23, the manager of a Thom McAn shoe store, said he hasn't heard much complaint. "It's not a big issue," he said.

SAM MIRCOVICH

Melanie Bowman, with Nicholas, 4, and Jonathan, says theater has right to be there.

GARY AMBROSE

Portfolios of evidence from Santa Ana's suits against the Mitchell Brothers line a courtroom wall.

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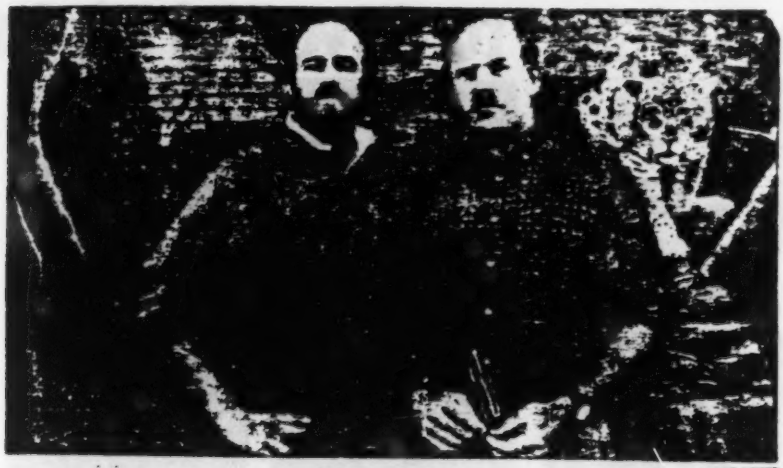
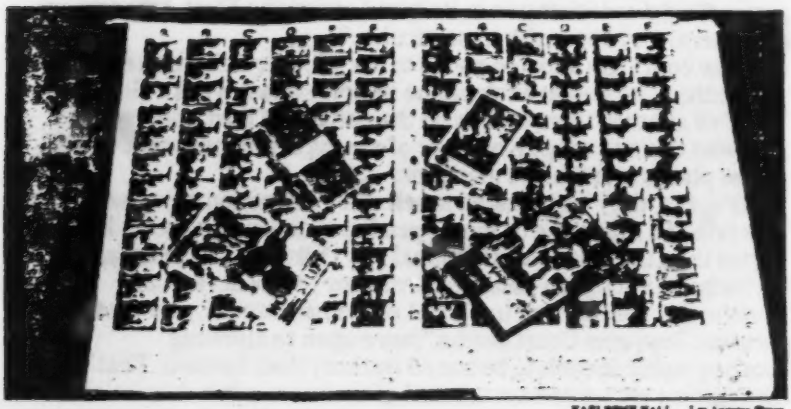
THEATER: No End in Sight to City's Legal Battle With Mitchell Brothers



The Mitchell brothers, Artie, left, and Jim, stand in front of their San Francisco adult theater

The Mitchell Brothers' lease on the United Artists theater at Honer Plaza runs out in June, 1990



KARI KEHR HALL Los Angeles Times

Photographs and videocassettes make up some of the evidence in lawsuits against the theater.

THEATER: Politics Cited in Refusal to Give Up Fight

JOHN ACOSTA
City councilman

GORDON BRICKER
Planning Commissioner

JAMES J. CLANCY
City attorney

Local Authorities Gaining Ground in Fight Against Adult Businesses

Local jurisdictions are being given a greater opportunity to decide how to handle films and other activities they consider obscene, two law professors say.

Although the U.S. Supreme Court has refused to authorize the closure of a theater for showing obscene films, it has acted "to loosen up the ease in which state and local communities can regulate this kind of material," William Van Alstyne of Duke University said.

Van Alstyne, who teaches constitutional law in regards to freedom of expression issues, said that the present court "has been exceedingly conservative in its trend under the First Amendment in general and obscenity in particular."

"The court has allowed states to use a looser definition of obscenity," he said in a telephone interview last week. "Second, they've allowed them to jack up the penalty. Third, they've allowed them to adopt a number of zoning ordinances that drive these places into limited locations.

"Fourth, they've invested much more discretion in juries, so that the fate of a magazine or movie producer depends more on local juries than the state constitutional law than it did 10 years ago."

Richard Fallon, an assistant professor of law at Harvard University specializing in First Amendment issues, said that the present Supreme Court seems "more open to allowing pornographic speech to be zoned [rather] than banned. That's a distinction with a certain amount of common-sense attraction. If the argument is that it offends some people, instead of banning it, why not move it out of the way?"

—STEVE EMMONS

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